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Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

No. 72-331

LOUIS J. LEFKOWITZ, NELSON A. ROCKEFELLER,
B. JOHN TUTUSKA,

Appellants,

against

M. RUSSELL TURLEY and ROBERT H.
STIEVATER,

Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF NEW YORK.

MOTION TO DISMISS OR AFFIRM

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The Appellees move the Court to dismiss the appeal herein, or, in the alternative, to affirm the judgment of the United States District Court for the Western District of New York entered on May 1, 1972 declaring New York General Municipal Law, Sections 103-a and 103-b and New York Public Authorities Law, Section 2601 and Section 2602, unconstitutional, on the grounds that it is manifest that the questions on which the decision of the cause depends are so unsubstantial as to need no further arguments.

L**The State Statutes Involved and the Nature of the Case****A.****The Statutes.**

New York General Municipal Law, Sections 103-a and 103-b and New York Public Authorities Law, Sections 2601 and 2602 are reproduced as Appendix "B" in the jurisdictional statement for Appellants Lefkowitz and Rockefeller. The Statutes provide that as a penalty for refusal to sign a waiver of immunity in Grand Jury proceedings a witness shall be disqualified from public contracting and existing contracts may be cancelled.

B.**The Proceedings Below.**

Appellees, architects licensed in the State of New York, have sought declaratory and injunctive relief from the above statutes as a result of their refusal to sign waivers of immunity in certain Grand Jury proceedings conducted in Erie County, New York allegedly investigating charges of conspiracy, bribery and larceny regarding the proposed construction of a stadium in Erie County which Appellees were then designing.

Upon motion for summary judgment, a three-judge court for the Western District of New York has ordered and adjudged that the above statutes are unconstitutional and has enjoined Appellants from further enforcement pursuant to said statutes.

II.

ARGUMENT

The case presents no substantial question not previously decided by this Court.

In *Perla vs. State of New York*, 392 U. S. 296 (1968) the Court held that a public employee could not be discharged from employment pursuant to Section 6 of Article I of the New York State Constitution for refusal to sign a waiver of immunity in an Erie County Grand Jury investigation concerning directly his public office.

In *Garrity vs. New Jersey*, 385 U. S. 493 (1967) the Court held that statements made in an investigation of police officers under threat of job forfeiture could not be used in subsequent proceedings against such officers since such testimony was given under compulsion.

In *Spevack vs. Klein*, 385 U. S. 511 (1967) the Court held that an attorney may not be penalized with disbarment for exercising his fifth amendment privilege in professional disciplinary proceedings.

In *Gardner vs. Broderick*, 392 U. S. 273 (1968) the Court struck down a New York City Charter provision for the discharge of a police officer who refused to waive immunity from prosecution.

In *Uniformed Sanitation Men Association vs. Commissioner of Sanitation*, 392 U. S. 580 (1968) it was held that discharge of City employees for refusal to sign waivers of immunity before a Grand Jury or for invoking their constitutional privilege was unconstitutional.

The State, of course, attempts to find a distinction in the proposed conclusion that garbage collectors (*Uniform*

Sanitation Men Association vs. Commissioner of Sanitation, supra) have less freedom of choice to contract for employment than architects in contracting for the design of public buildings, an argument characterized as "facile but question-begging generalizations" in *Holland vs. Hogan*, 272 F. Supp. 855, 869 (S. E. N. Y. 1967), reversed and remanded, 392 U. S. 654 (1967).

The State's interests are not unprotected by the above decisions. The State may at any time discharge an employee or impose a penalty on a contractor, presumably, who refuses to answer questions "specifically, directly and narrowly relating to the performance of his official duties, without being required to waive his immunity with respect to the use of his answers or the fruits thereof in a criminal prosecution of himself." (*Gardner vs. Broderick, supra* at 278.)

III.

CONCLUSION

All questions raised upon this appeal have been repeatedly ruled upon by this Court and no substantial new questions are presented herein.

WHEREFORE, Appellee respectfully submits that the questions upon which this cause depend are so unsubstantial as not to need further argument and Appellee respectfully moves this Court to dismiss this appeal, or in the alternative, to affirm the judgment entered in the cause by the District Court of the Western District of New York.

Respectfully submitted,

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